Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

October Term, 1991

Connecticut Bank and Trust Company,
National Association, *et al.*,

Petitioners,

v.

Wilmington Trust Company,
and
United States District Court for the District of Hawaii, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Can a plaintiff's right to have its admiralty actions tried to the bench, pursuant to Rule 9(h) and 38(e), Fed R. Civ. P., be nullified by a permissive intervenor who joins non-admiralty claims and demands a jury trial pursuant to Rule 38(a), Fed. R. Civ. P., and the "saving to suitors" clause of 28 U.S.C. § 1333(1) (1988).

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

The Parties in this Court are as follows:

Petitioners: Connecticut Bank and Trust Company, National Association,[1] and Wartsila Marine Industries Inc.[2]

Respondents: Wilmington Trust Company and International Organization of Masters, Mates & Pilots[3] and the United States District Court for the District of Hawaii.

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[1] Following the initiation of this action, the corporate trust department of Connecticut Bank and Trust Company, National Association, was acquired by State Street Bank and Trust Company of Connecticut, N.A. and its name was changed accordingly. State Street Bank and Trust Company of Connecticut, N.A. is wholly owned by State Street Bank and Trust Company, which is, in turn, wholly owned by State Street Boston Corporation.

[2] At the initiation of this action, Wartsila Marine Industries Inc., a Finnish corporation, was owned by two Finnish corporations, Oy Wartsila Ab (70%) and Valmet Corporation (30%). In August, 1989, Oy Wartsila Ab transferred 51% of its ownership to Union Bank of Finland and its corporate affiliate, Pomi Trading Oy, and the Government of Finland acquired majority control of the Board of Directors of Wartsila Marine Industries Inc. On October 23, 1989, Wartsila Marine Industries Inc. filed for bankruptcy in the City Court of Helsinki, Finland and is in the process of being liquidated pursuant to Finnish bankruptcy law.

[3] This proceeding was instituted by Connecticut Bank and Trust Company, National Association as an admiralty *in rem* proceeding against the U.S.-flag vessel "MONTEREY" and an *in personam* proceeding against its owner, the S.S. Monterey Limited Partnership, for a deficiency judgment. Respondents as well as the following other parties intervened as claimants/plaintiffs against the original defendants: VSE Corporation, Theodavies Marine Agencies, Inc., Bethlehem Steel Corporation, Cosmetic Consultants of Hawaii, Lihue Plantation Company, Limited (d.b.a. Kauai Sugar Storage Company), Pacifico Creative Service, Inc., The Maritime Institute of Technology and Graduate Studies, the International Organization of Masters, Mates & Pilots and John F. Sokolowski, Hawaii Stevedores, Inc.,

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In the court from whose judgment review is sought, Petitioners were the Real Parties in Interest, Respondents were Petitioners and the United States District Court for the District of Hawaii was the Respondent.

H.T. & T. Co., Inc., McCabe Hamilton & Renny Co., Inc., Matson Services, Inc., American Ship Management, Inc., Jas W. Glover, Ltd., Velma L. Sullivan, Martin S. Doten, Leon M. Yarborough, Timothy C. Aspinall, Hans W. Purdom and Andres and Manuela Suguitan.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Connecticut Bank and Trust Company, National Association, *et al.*, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this case on April 12, 1991 and amended on May 7, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Wilmington Trust v. United States District Court for the District of Hawaii*, as amended, is reported at 934 F.2d 1026 (9th Cir. 1991) and is reprinted in the Appendix to this Petition ("App.") p. 1a. The denial by the United States Court of Appeals for the Ninth Circuit of Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc is

reprinted in the Appendix, App. p. 15a. The order of the United States District Court for the District of Hawaii granting the motion of Petitioners to strike Respondents' jury demand is reprinted in the Appendix, App. p. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1991 and amended on May 7, 1991. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on November 4, 1991.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

FEDERAL STATUTES AND RULES INVOLVED

The relevant federal statutory provisions and rules are reprinted in the Appendix. They are: 28 U.S.C. § 1333(1) (1988), App. p. 20a; Federal Rule of Civil Procedure 9(h), App. p. 21a; and Federal Rules of Civil Procedure 38(a) and (e), App. p. 22a.

STATEMENT OF THE CASE

This Petition challenges the decision of a three-judge panel of the United States Court of Appeals for the Ninth Circuit which issued a writ of mandamus to the district court directing that it hold a jury trial of certain non-admiralty claims based on alleged independent jurisdictional grounds joined by a permissive intervenor in an action within the exclusive admiralty jurisdiction of the district court. The Ninth Circuit's decision further held that, if the non-admiralty claims were closely related factually to the plaintiff's underlying admiralty claims, its decision would result in the entire case being tried to the jury. By so holding, the Ninth Circuit has emasculated the well-established right of a plaintiff to have its admiralty action tried to the bench under Rules 9(h) and 38(e), Fed. R. Civ. P.

On May 15, 1989, Petitioner Connecticut Bank and Trust Company, National Association ("Connecticut Bank"), as in-

denture trustee, filed pursuant to Rule 9(h), Fed. R. Civ. P., a complaint in foreclosure of a preferred mortgage against the U.S.-flag vessel "MONTEREY" (the "Vessel") *in rem* and against its owner, the S.S. Monterey Limited Partnership, *in personam* for a deficiency judgment. Exclusive subject matter jurisdiction was predicated in the United States District Court for the District of Hawaii on 46 U.S.C. § 31325(b)(1) and (c) (Supp. 1989) and on 28 U.S.C. § 1333 (1988). Neither the Rule 9(h) designation in the complaint nor the exclusive admiralty jurisdiction over the claims in the complaint is disputed.

Respondent, Wilmington Trust Company ("Wilmington Trust"), as indenture trustee for Respondent International Organization of Masters, Mates & Pilots (the "Union"), intervened as a claimant against the Vessel and filed an answer to Connecticut Bank's complaint pursuant to Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims. In its answer, Wilmington Trust asserted affirmative defenses and a claim for equitable subordination of Connecticut Bank's first mortgage to Wilmington Trust's second mortgage on the Vessel.

In addition, the Union selected the admiralty action as the forum for non-admiralty claims which it wanted to pursue against Wartsila Marine Industries Inc. ("Wartsila Marine"), one of the beneficiaries of Connecticut Bank's preferred mortgage, and Oy Wartsila Ab, the principal shareholder of Wartsila Marine. The two Wartsila companies were independent Finnish corporations and neither was a named party in the action. The Union styled these non-admiralty claims as "counterclaims" although neither Wilmington Trust nor the Union had been sued *in personam* by Connecticut Bank or the two Wartsila companies. The Union asserted 28 U.S.C. §§ 1331 (federal question) and 1332 (diversity) as the jurisdictional bases for its non-admiralty "counterclaims" and demanded a jury trial pursuant to Rule 38(a), Fed. R. Civ. P., and the "saving to suitors" clause of 28 U.S.C. § 1333(1) in an attempt to nullify Connec-

ticut Bank's Rule 9(h) designation of the action as a non-jury admiralty action.

On July 30, 1990, the district court granted Connecticut Bank's motion to strike the Union's jury trial demand. On September 4, 1990, Respondent Wilmington Trust filed a Petition for Writ of Mandamus in the Ninth Circuit to direct the district court to hold a jury trial of the Union's "counterclaims" and Connecticut Bank's factually related admiralty claims. The Ninth Circuit granted the Petition for Writ of Mandamus by opinion dated April 12, 1991, which was subsequently amended for publication on May 7, 1991. Connecticut Bank timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc on April 29, 1991, both of which the Ninth Circuit denied by order dated November 4, 1991.

Following the filing of the Petition for Writ of Mandamus, the district court on May 17, 1991, granted summary judgment against all of the Union's non-admiralty "counterclaims" that were the subject of the Petition, leaving only a common-law fraud claim that the Union had been permitted to join by amendment on September 26, 1990 against the two Wartsila companies, and Wilmington Trust's admiralty claim for equitable subordination of Connecticut Bank's preferred mortgage. Also on May 17, 1991 the district court dismissed Oy Wartsila Ab from the case for lack of personal jurisdiction, which dismissal is currently on appeal to the Ninth Circuit, and upheld the validity of Connecticut Bank's preferred mortgage. Finally, on October 7, 1991, the district court denied the motion filed by Wartsila Marine to dismiss the Union's common-law fraud claim for lack of diversity jurisdiction. The district court recognized that the Union's fraud claim was permissive and that there was no diversity jurisdiction to support it. Nonetheless, the district court exercised its discretion to retain the Union's fraud claim under the doctrine of pendent jurisdiction notwithstanding its dismissal of all of the Union's federal claims.

As directed by the Ninth Circuit, the district court ordered a jury trial of the Union's fraud claim against Wartsila Marine to be held concurrently with the trial of Wilmington Trust's equitable subordination claim against Connecticut Bank's preferred mortgage. The trial is scheduled to commence on July 6, 1992. Consequently, Petitioners respectfully request that this Court give prompt consideration to this Petition. If this Petition is granted before the scheduled trial date, Petitioners will move the district court for a stay of the trial pending review by this Court.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's decision emasculates Federal Rules of Civil Procedure 9(h) and 38(a), which preserve the well-established right of admiralty plaintiffs to a non-jury trial.

The Ninth Circuit's decision emasculates Rules 9(h) and 38(e), Fed. R. Civ. P., by allowing an intervenor who joins non-admiralty claims with an alleged independent basis of jurisdiction to nullify the plaintiff's well-established right to have its admiralty action tried to the bench. *See, generally*, 9 Wright & Miller, *Federal Practice & Procedure* § 2315, at 76 (1971) ("If plaintiff [chooses to identify its claim as an admiralty claim under Rule 9(h),] there will ordinarily be no jury trial."); 2A J. W. Moore, *Moore's Federal Practice*, ¶ 9.09, at 9-98 (1991) ("A defendant in a case brought within admiralty jurisdiction loses the right he would have in an ordinary civil action at 'law' to demand a jury trial . . . ."). *See also* M. J. Norris, *Maritime Personal Injuries* § 115, at 505 (3d ed. 1981) ("If a plaintiff wishes to try his case before the court he can *preclude* a jury demand from the defendant by invoking admiralty or maritime jurisdiction [through Rule 9(h)]." (emphasis added))

Congress has delegated to the Supreme Court the power to prescribe rules of practice and procedure for the federal courts.

28 U.S.C. § 2072 (1988). Pursuant to this authority, the Chief Justice in 1964 convened the Judicial Conference of the United States which appointed an Advisory Committee for the unification of the Civil and Admiralty Rules. The Advisory Committee was composed of America's most eminent admiralty scholars and practitioners. *See, generally, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the U.S. District Courts*, 34 F.R.D. 325 (1964) and S.B. Bradley, *Admiralty Aspects of the Civil Rules*, 41 F.R.D. 257 (1967).

When Rule 9(h) was enacted in 1966, the Advisory Committee agreed that "[c]ertain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty." Fed. R. Civ. P. 9 advisory committee notes at 42 (West 1991). The Committee specifically disclaimed any intent to change settled admiralty law with respect to the non-jury feature of admiralty. "It is no part of the purpose of unification to inject a right to jury trial into these admiralty cases in which that right is not provided by statute." *Id.* The Committee members unambiguously stated that it was their intent in drafting Rule 9(h) to "provide some device for preserving the present *power* of the pleader to determine whether these historically maritime procedures [including a non-jury trial] shall be applicable to his claim or not . . . ." *Id.*, at 42-43 (emphasis supplied). To this end, Rule 38(e) was promulgated as a companion to Rule 9(h) to guarantee that the unified admiralty and civil rules were not to be construed as creating a jury trial right in admiralty.

Leavenworth Colby, a key member of the Advisory Committee and Chief of the U.S. Justice Department's admiralty section, reported in his commentary on the new rules that Rule 9(h), when read in conjunction with Rule 38(e), "preserves for admiralty and maritime cases the plaintiff's *right* to foreclose a demand by defendant for jury trial." L. Colby, *Admiralty Unification*, 54 Geo. L.J. 1259, 1261 (1966) (emphasis sup-

plied). This right was based upon what Professor Colby termed the "[a]dmiralty freedom from jury trial." *Id.*

The rules proposed by the Advisory Committee, including the no-jury-in-admiralty provisions, were approved by this Court without change,[4] and were presented by the Chief Justice to Congress pursuant to 28 U.S.C. § 2072. After a 90 day "layover" period with Congress, the new rules became effective. "The purpose of this layover period is clearly to permit legislative scrutiny and, where appropriate, legislative veto." *In re Halkin*, 598 F.2d 176, 185 n.17 (D.C. Cir. 1979).

Accordingly, Rules 9(h) and 38(e), which preserved the maritime *status quo* by reaffirming that an admiralty plaintiff had the power to create a non-jury trial, were approved by this Court, scrutinized by Congress, and entered into law in 1966.

The Ninth Circuit completely disregarded the Advisory Committee's published comments and numerous maritime precedents when it boldly stated that a plaintiff's "election to proceed in admiralty via a Rule 9(h) designation does not affect another party's right to a jury." *Wilmington Trust v. United States Dist. Ct.*, 934 F.2d 1026, 1031 (9th Cir. 1991). At the very least, this statement is unnecessarily broad and dangerously worded. It is also a misstatement of the law. It deprives a plaintiff of not only a privilege but a "power" and a "right" to determine the procedural consequences of his admiralty suit, and will "undermine," "emasculate" and "undercut" plaintiff's rights under Rules 9(h) and 38(e). *See Harrison v. Flota Mercante Grancolombiana S.A.*, 577 F. 2d 968, 987 (5th Cir. 1978); *Insurance Co. of N. Am. v. Virgilio*, 574 F. Supp. 48, 51 (C.D.

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[4] *Order of February 28, 1966*, 86 S. Ct. at 173 (1966). Several courts have interpreted this Court's approval of Rules 9(h) and 38(e) as proof that the court "acquiesced to the tradition of not allowing a jury trial if the federal court's jurisdiction is founded upon the admiralty and maritime nature of the suit." *McCann v. Falgout Boat Co*, 44 F.R.D. 34, 43-44 (S.D. Texas 1968); *Cantey v. Flensburger Dampfercompagnie Harald Schuldt & Co.*, 55 F.R.D. 127, 128 (E.D.N.C. 1971).

Cal. 1983); *Zurich Ins. Co. v. Banana Services*, 1985 A.M.C. 1745, 1745 (S.D. Fla. 1984). The Ninth Circuit has effectively written the no-jury-in-admiralty principle set forth in Rules 9(h) and 38(e) out of the Federal Rules of Civil Procedure. Given the breadth of the Ninth Circuit's ruling, it is hard to conceive of any maritime case (which almost inevitably involves diverse, international parties) where it would be possible to maintain plaintiff's non-jury election, since clever lawyers will always be able to concoct common law counterclaims or cross claims to inject in admiralty proceedings for the purpose of defeating a plaintiff's Rule 9(h) designation.

The Federal Rules are not mere procedural guidelines. They are to be given the same force and effect as other statutes. *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 50 n.19 (D.D.C. 1984) (citing 28 U.S.C. § 2072, and *United States ex rel. Tanos v. St. Paul Mercury Ins. Co.*, 361 F.2d 838, 839 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966)). Therefore, federal rules such as 9(h) and 38(e) should not be construed in such a manner as to render them ineffective. A cardinal principle of statutory construction is to accord each clause and word due effect. *United States v. Menasche*, 348 U.S. 528, 539 (1955). No part of a statute or rule should be interpreted in such a way as to make it superfluous, or mere surplusage. *Pacific Mut. Ins. Co. v. American Guar. Life Ins.*, 722 F.2d 1498, 1500 (9th Cir. 1984). And when interpreting the federal rules, the Advisory Committee's construction is to be given particular deference. *See Mississippi Publishing Corp. V. Murphree*, 326 U.S. 438, 444 (1946). However, in *Wilmington Trust*, the Ninth Circuit has ignored all of these accepted rules of construction.

The holding in *Wilmington Trust* has extremely adverse practical consequences for admiralty practitioners, as well as for the efficiency of the federal courts. If a maritime plaintiff's Rule 9(h) election is so easily defeated, then nearly *every* maritime

case will be heard by a jury. District courts (particularly in busy port cities like Los Angeles, San Francisco, Seattle and New Orleans) will be confronted with a greater number of costly and time-consuming jury trials.

As the Fifth Circuit (which is known for its particular admiralty expertise) recognized in *Merchants National Bank of Mobil v. The Dredge General G.L. Gillespie*, 663 F.2d 1338, 1346-51 (5th Cir. 1980), *cert. denied*, 456 U.S. 966 (1982), admiralty is unique. It pre-existed even the earliest English common law, and involves a complicated intermeshing of international law, centuries old practices and procedures, and the presumption that judges, rather than juries, are the best fact-finders of complicated salvage, limitation of liability, collision, maritime lien and general average cases. *See, e.g., McCann v. Falgout Boat Co.*, 44 F.R.D. 34, 43 (S.D. Tex. 1968) (citing 2 S. F. Friedell *et al.*, *Benedict on Admiralty* § 224 (1940)).

In *Merchants*, the Fifth Circuit refused to strike down the traditional admiralty remedies of arrest and pre-trial attachment, despite defendants' arguments that such procedures were old-fashioned and violated modern rules of due process. The court emphasized that the admiralty procedures at issue had "roots deep in the maritime history of the nation," and have been a "distinguishing feature" of the admiralty jurisdiction for centuries. *Merchants*, 663 F.2d at 1342 & n.8. Accordingly, the court would not "take lightly" their importance to the law of admiralty, and ruled that "the Constitution is sufficiently flexible to permit its requirements to be considered in relation to the legal and commercial contexts in which they are invoked." *Id.*, at 1343. In essence, the court found that where certain inherently admiralty procedures have existed since the Constitution was enacted, the courts should be very cautious about destroying or emasculating them.

The Ninth Circuit's decision, on the other hand, ignores long-standing admiralty rights and traditions. The Ninth Circuit

justified its rejection of maritime law upon, in part, the Seventh Amendment's preservation of jury trial rights for common law claimants. *Wilmington Trust*, 934 F.2d at 1029. However, the Seventh Amendment only applies to "suits at common law" and the Ninth Circuit ignored the fact that this Court has specifically held that the Seventh Amendment does not require jury trials in admiralty cases. *Fitzgerald v. U.S. Lines*, 374 U.S. 16, 20 (1963). *See also* Chief Justice Marshall's opinion in *The Sarah*, 21 U.S. 391, 394 (1823) ("In cases of admiralty and maritime jurisdiction, it has been settled...that the trial is to be by the court.")

The Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (currently codified at 28 U.S.C. § 1331) specially excepted cases brought under the admiralty jurisdiction from the Seventh Amendment's right to a jury trial. Furthermore, this Court has ruled that admiralty cases are not cases at common law, within the meaning of the Seventh Amendment. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 459-60 (1847).

There is no dispute that the case below was within the district court's exclusive admiralty jurisdiction. No purer maritime action exists than the *in rem* enforcement of a preferred ship mortgage or maritime lien. Accordingly, the Seventh Amendment may not be used by Respondents to bootstrap common law jury rights into an action which, at base, arises out of the court's admiralty jurisdiction.

2. The Ninth Circuit's decision conflicts with prior Ninth Circuit precedent and is based on a misinterpretation of this Court's precedent.

In *McCrary v. Sea Train Lines, Inc.*, 469 F.2d 666, 668 (9th Cir. 1972), the Ninth Circuit unequivocally declared:

> A shipowner has the right, if exercised by timely designation, to assert through Rule 9(h) recourse to

> traditional admiralty practice and thus to obviate the jury trial on the third party claim.

The *McCrary* court noted that the admiralty claim was ancillary to the third party claimant's diversity action. Nonetheless, the shipowner was entitled to have *all* of the issues in the case tried before the court alone.

Twelve years later, *McCrary* was approvingly cited by the Ninth Circuit court in *Emerson G.M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468, 1471-72 (9th Cir. 1984). The *Emerson* court followed *McCrary*, and ruled that a third party defendant had no right to a jury trial where the original plaintiff had properly elected to identify his claim as maritime under Rule 9(h).

Bound by the holdings in *Emerson* and *McCrary*, district courts within the Ninth Circuit have regularly ruled that plaintiff's timely recourse to Rule 9(h) precludes a defendant, cross-claimant, or cross-defendant from having a jury trial. *See, e.g., Reliance Ins. Co. v. McGrath*, 671 F. Supp. 669, 674 (N.D. Cal. 1987); *Insurance Co. of N. Am. v. Virgilio*, 574 F. Supp. 48, 50-51 (C.D. Cal. 1983); *Underwriters at Lloyds v. May*, 1983 A.M.C. 2447 (S.D. Cal. 1983); *Elverfeld v. Central Gulf S.S. Co.*, 1974 A.M.C. 409 (N.D. Cal. 1973); and *Alaska Barite Co. v. Freighters Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972).

The Ninth Circuit, however, ignored its own recent rulings holding that plaintiff's Rule 9(h) election precludes defendants or intervenors from asserting a right to a jury trial. The Ninth Circuit grounded its holding in *Wilmington Trust* on its belief that this Court allowed in an admiralty action a seaman's admiralty claims for unseaworthiness and maintenance and cure to be tried before a jury together with his statutory Jones Act claim in *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963). However, the Ninth Circuit misinterpreted *Fitzgerald* by failing to distinguish between admiralty claims in actions at law and admiralty actions, and by construing *Fitzgerald* as an admiralty

action. *Fitzgerald* was not an admiralty action, but rather an action at law, which included admiralty claims that were brought on the civil side of the court prior to the merger of the civil and admiralty rules. The Jones Act specifically provides that a seaman can bring his negligence claims "at law, with the right of trial by jury." 46 U.S.C. App. § 688 (1988). However, this statutory provision only applies in actions at law. This Court established long before *Fitzgerald* that a seaman who brought his claim in an admiralty action would not have any right to a jury trial. *See Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391 (1924). Thus, *Fitzgerald*, cannot be constured to permit jury trials in admiralty actions. This Court has never held that admiralty actions can be tried to a jury in the absence of a statute that specifically provides for a jury trial.

The holding in *Fitzgerald* is much narrower than the Ninth Circuit believed,[5] and represented this Court's administrative response to an historical accident – the intertwining of three essentially similar causes of action arising out of the same operative facts. The three claims in *Fitzgerald* were "essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." *Id.* at 21. Since Congress had specifically granted a jury trial right to seamen in actions at law under the Jones Act, it made sense to have all three closely interrelated matters heard before the same trier of fact. The result was particularly appropriate since seamen are traditionally seen as the "children of admiralty" and "wards of the court," and are treated with extreme solicitude by the federal bench. *See, e.g., California Home Brands v. Ferreira*, 871 F.2d 830, 837-38 (9th Cir. 1989).

All of the cases cited as authoritative by the Ninth Circuit were seamen's personal injury actions, and are therefore not

[5] The actual holding in *Fitzgerald* was very narrowly drawn. "[W]e hold that a maintenance and cure claim joined with a Jones Act claim must be submitted to a jury when both arise out of one set of facts." 374 U.S. at 21.

controlling authority for the Ninth Circuit's sweeping decision that a third-party intervenor with an arguably related claim with an alleged independent basis of jurisdiction will, under the "savings to suitors" clause of 28 U.S.C. § 1333(1), always be able to defeat a maritime plaintiff's right to elect a non-jury proceeding by means of a Rule 9(h) designation.

Furthermore, the *Fitzgerald* case must be viewed in context. This Court traditionally conforms its own judge-made maritime remedies for seamen to those which have been promulgated by Congress. Whenever the national legislature has already spoken on a specific subject, this Court will not use its own interpretation of the general maritime law to expand or contract the remedies or procedures provided by statute. *See, e.g., Miles v. Apex Marine Corp.*, ____ U.S. ____, 111 S. Ct. 317, 319 (1990) (refusal to extend a seaman's rights to compensation under the federal maritime law since Congress had explicitly limited a seaman's compensation remedies under the Jones Act). Seen in this context, the *Fitzgerald* court was merely deferring to Congress' statutory directive. Since the Jones Act explicitly granted jury trials for seamen's negligence claims, the court exercised its power to have unseaworthiness and maintenance and cure claims arising out of the same facts tried by the same jury.

In *Wilmington Trust*, however, no such Congressional directive exists. Congress has never granted *in rem* claimants, or any parties, other than seamen, a statutory right to a jury trial. To the contrary, by accepting Rules 9(h) and 38(e), Congress implicitly gave its imprimatur to the long established no-jury-in-admiralty principle.

The Ninth Circuit's reliance on this Court's decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) is also misplaced because those cases involved a "race to the courthouse," where the plaintiff sought to deny the defendant the right

to a jury trial on its claim at law by suing first in equity. This Court held in *Beacon Theatres* that the defendant's antitrust claim at law must be tried first to a jury before the plaintiff's claim in equity for declaratory relief.

This action, however, did not involve a "race to the courthouse." Connecticut Bank brought an *in rem* admiralty action against the Vessel and its owner, in which Respondents later intervened and chose to insert *in personam* claims against additional parties. As the district court reasoned in *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972):

> Here, there are actually two separate areas of dispute unlike *Beacon Theatres*. Plaintiff has alleged a breach of contract while defendant has made a counterclaim alleging a violation of antitrust laws. The admiralty contract claim was brought first. To allow defendant to defeat plaintiff's right to a non-jury trial under Rules 9(h) and 38(e) would create an easy method for all defendants in admiralty to get out from under the retained admiralty practices. This Court does not believe that the rights invoked by making an election under Rule 9(h) were meant to be negated whenever a defendant makes a counterclaim outside of admiralty. The plaintiff has properly made an election to use Rule 9(h) and therefore he has the right to a non-jury trial.

Id., at 195.

3. The Ninth Circuit's decision conflicts with decisions of other circuits.

The Ninth Circuit, in *Wilmington Trust*, flatly stated that "a Rule 9(h) designation does not affect another party's right to a jury." *Wilmington Trust*, 934 F.2d at 1030-31. In *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 987 (5th Cir. 1987), the Fifth Circuit reached an absolutely contrary

conclusion. The Fifth Circuit "closely scrutinized" the tension between Rule 9(h) and the common law right to trial by jury. It carefully reviewed the legislative history of Rule 9(h) and the Advisory Committee's interpretation that the unification of the civil and admiralty rules would not infringe upon "the present power of the pleader to determine whether these historic maritime procedures [including a non-jury trial] shall be applicable to his claim or not . . . ." *Id.*, at 986-87. The Fifth Circuit denied cross-defendants' request for a jury (although an independent basis for jurisdiction existed) on the grounds, *inter alia*, that it would be an excess of judicial power "to permit a third party defendant to emasculate the election given to the plaintiff by Rule 9(h) by exercising the single expedient of bringing in a fourth party defendant." *Id.*, at 987.

Numerous panels of the Fifth Circuit, and lower courts within the Fifth Circuit, have similarly ruled that once a Rule 9(h) election is made by plaintiff, the existence of diverse citizenship or a federal question as an alternate basis of jurisdiction does not entitle *any* other party to a jury trial. *See, e.g., TNT Marine Service Inc.*, 702 F.2d 585, 587 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983); *Fisher v. Danos*, 671 F.2d 904, 906 (5th Cir. 1982), *cert. denied*, 452 U.S. 840 (1982); *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1253-54 (5th Cir. 1975); *Hails v. Atlantic Richfield Co.*, 595 F. Supp. 948, 951-52 (W.D. La. 1984); *Arkwright Boston Mfrs. Mut. Ins. Co. v. Bauer Dredging Co.*, 74 F.R.D. 461, 462 (S.D. Texas 1977).

The Ninth Circuit's decision also conflicts with decisions of other courts in other circuits. In *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041 (8th Cir. 1983), the Eighth Circuit acknowledged that once a plaintiff designates his claim as a 9(h) claim in admiralty, such an election ordinarily precludes a jury trial. The court acknowledged that jury trials are not expressly prohibited in admiralty, but affirmed the lower court's decision to honor plaintiff's election to have its admiralty

claims tried by the court alone. *See, also, Royal Ins. Co. of America v. Hansen*, 125 F.R.D. 5, 6-9 (D. Mass. 1988); *Zurich Ins. Co. v. Banana Services*, 1985 A.M.C. 1745 (S.D. Fla. 1984); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint*, 90 F.R.D. 313, 317 (E.D.N.Y. 1981); *Cantey v. Flensburger Dampfercompagnie Harald Schuldt & Co.*, 55 F.R.D. 127, 128 (E.D.N.C. 1971).

The Ninth Circuit's holding in *Wilmington Trust* squarely conflicts with the carefully reasoned holdings of other circuit court panels, as well as with numerous district court decisions. It is important for this Court to establish a uniform rule among the circuits that a plaintiff has the right to preserve the non-jury feature of admiralty jurisdiction by means of a Rule 9(h) designation.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of *certiorari* should issue to review the decision of the Ninth Circuit in this case. Petitioners respectfully request that this writ be issued before the July 6, 1992 jury trial ordered by the district court. If the writ is issued before the scheduled trial date, then Petitioners will request that the district court stay the trial pending review by this Court.

Respectfully submitted

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APPENDIX A

WILMINGTON TRUST and International Organization of Masters, Mates & Pilots, Petitioners,

v.

The UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, Respondent,

and

Connecticut Bank and Trust Company, National Association Wartsila Marine Industries, Inc. and Oy Wartsila Ab, Real Parties in Interest;

VSE Corporation; Theodavis Marine Agencies, Inc.; Pacifico Creative Service, Inc.; the Maritime Institute of Technology and Graduate Studies; International Organization of Masters, Mates & Pilots and John F. Sokolowski; Hawaii Stevedores, Inc.; H.T. & T. Co., Inc.; McCabe Hamilton & Renny Co., Inc.; Matson Services, Inc.; American Ship Management, Inc.; Jas W. Glover, Ltd.; Cosmetic Consultants of Hawaii; Andres Suguitan; Manuela Suguitan; Leon Marvin Yarborough; Timothy C. Aspinall; Martin S. Doten; Velma M. Sullivan; Bethlehem Steel Corporation; and the Lihue Plantation Company, Limited dba Kauai Sugar Storage Company, Other Parties.

No. 90-70433

United States Court of Appeals, Ninth Circuit

Argued and Submitted Jan. 18, 1991.
Decided April 12, 1991.
Amended May 7, 1991.

[*1027] Action was brought to foreclose on first preferred ship mortgage. Holder of second preferred ship mortgage answered plaintiff's complaint, filed counterclaims, and demanded a jury trial on the counterclaims. The United States Distrcit Court for the District of Hawaii, Samuel P. King, J., entered order striking second mortgage holder's jury trial demand, and second mortgage holder petitioned for writ of mandamus. The Court of Appeals, Shubb, District Judge, sitting by designation, held that plaintiff's election to proceed in admiralty did not affect defendant's right to jury trial.

Writ issued.

John F. Keating, Hill, Betts & Nash, New York City, for petitioners.

Michael Evan Jaffe, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., for real parties in interest.

Petition for Writ of Mandamus to the United States District Court for the District of Hawaii.

Before TANG and NOONAN, Circuit Judges, and SHUBB,* District Judge.

SHUBB, District Judge:

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* Honorable William B. Shubb, United States District Judge for the Eastern District of California, sitting by designation.

I
PROCEDURAL AND FACTUAL BACKGROUND

Petitioners Wilmington Trust, as trustee for the International Organization of Masters, Mates and Pilots ("Union"), and the Union request this court to issue a writ of mandamus directing United States District Judge Samuel P. King to try the Union's claims before a jury. The court has jurisdiction to consider and issue the writ pursuant to 28 U.S.C. § 1651(a).[1]

The underlying action was initiated by Respondent Connecticut Bank & Trust Company ("Connecticut Bank"), solely as indenture trustee for Wartsila Marine Industries, Inc. ("Wartsila") a Finnish corporation. The complaint consists of an *in rem* claim to foreclose a First Preferred Ship Mortgage against the SS Monterey ("vessel"), and a related *in personam* claim against the owner of the vessel, the SS Monterey Limited Partnership ("Partnership").[2] The complaint also includes the assertion that "Plaintiff's claim is an admiralty and Maritime Claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and the Ship Mortgage Act of 1920, 46 U.S.C. § 911 *et seq.*"[3]

The Union, though not a named defendant, answered the complaint and filed an *in rem* claim against the vessel to foreclose a Second Preferred Ship Mortgage and several other claims designated as "counterclaims" ("Counterclaims") against Wartsila. The Union demanded a jury trial. Those

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[1] Section 1651(a) provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[2] The parties concede that the claim against the Partnership is no longer part of the underlying action.

[3] The Ship Mortgage Act of 1920 was repealed effective January 1, 1989. Act of Nov. 23, 1988, Pub.L. 100-710, Title I, § 106(b)(2), 102 Stat. 4752.

Counterclaims include both legal and equitable claims. Independent jurisdictional [*1028] grounds are alleged for each claim and their joinder is not contested.

Wartsila's foreclosure action, and the Union's Counterclaims and foreclosure action, are factually interrelated and arise out of the following transactions. The Union exchanged its ownership interest in the vessel to the Partnership for a second preferred ship mortgage, an interest in the Partnership, and an agreement that the vessel would be staffed exclusively with Union members. One of the purposes of the exchange was to generate capital to refurbish the vessel. The Partnership contracted with Wartsila to refurbish the vessel and Wartsila extended credit to the Partnership in exchange for the first preferred ship mortgage.

The district court ordered the interlocutory sale of the vessel. Wartsila's indenture trustee, Connecticut Bank, is the named purchaser of the ship on behalf of Wartsila. According to undocumented assertions of counsel, Wartsila is involved in bankruptcy proceedings in Finland, and the Finnish Guaranty Board ("FGB"), a "foreign state" within the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, extended a letter of credit to Connecticut Bank on behalf of Wartsila enabling the bank to purchase the vessel at the interlocutory sale.

On July 30, 1990, the district court entered an order striking the Union's timely jury demand for the "reasons set forth in the memoranda of the Plaintiff Connecticut Bank." Connecticut Bank had urged the district court to strike the Union's jury demand on two grounds: first, Wartsila's 9(h) election to proceed within the court's admiralty jurisdiction extinguished any right to a jury trial that the Union may have had; second, Wartsila has a right to a non-jury trial pursuant to the Foreign Sovereign Immunities Act. For the reasons discussed below, we order the writ to issue.

II
STANDARD OF REVIEW

Mandamus is an extraordinary remedy "which is awarded, not as a matter of right, but in the exercise of sound judicial discretion." *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311-12, 38 S.Ct. 99, 100-01, 62 L.Ed. 309 (1917). Generally, a writ should issue only if the petitioner meets "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953). The right to a jury trial, however, has occupied an exceptional place in the history of the law of federal mandamus permitting a writ to issue although the petitioner is unable to show a "clear and indisputable" right. *See In re Simons*, 247 U.S. 231, 239-240, 38 S.Ct. 497, 497-98, 62 L.Ed. 1094 (1918). *See also Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511, 79 S.Ct. 948, 957, 3 L.Ed.2d 988 (1959) ("Whatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled.").

This Court recognizes that a party may seek relief in the form of mandamus to protect the party's right to a jury trial. *See Mondor v. United States Dist. Court*, 910 F.2d 585, 586-87 (9th Cir. 1990); *Owens-Illinois, Inc. v. United Dist. Court*, 698 F.2d 967, 969 (9th Cir. 1983). The only question before us is "whether the district court erred in denying petitioner's request for a jury trial." *Mondor*, 910 F.2d at 586.

III
WARTSILA'S RULE 9(h) DESIGNATION DID NOT EXTINGUISH THE UNION'S RIGHT TO JURY TRIAL

The basis for admiralty jurisdiction is set forth in 28 U.S.C. § 1333, which states:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all [*1029] cases all other remedies to which they are otherwise entitled.

The "saving-to-suitors" clause establishes the right of a party to choose whether to proceed within the court's admiralty jurisdiction or general civil jurisdiction when both admiralty and non-admiralty federal jurisdiction exist. *See, e.g., Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 359-60, 82 S.Ct. 780, 783-84, 7 L.Ed.2d 798 (1962).

Prior to the 1966 merger of law and admiralty, a plaintiff exercised this option by filing a claim on the admiralty side or the civil side of the federal court. *Id.* With the merger of law and admiralty, the Federal Rules of Civil Procedure advisory committee recognized the need for a mechanism to inform the court of a claimant's election to proceed in admiralty on claims cognizable both in admiralty and the court's general civil jurisdiction. Consequently, the committee noted:

> Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions.
>
> * * * * * *
>
> One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.
>
> * * * * * *

> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. . . . The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty where its character as such is not clear.

Fed.R.Civ.P. 9(h) advisory committee's notes to 1966 amendment.

Rule 9(h) provides the modern-day mechanism for invoking admiralty jurisdiction of claims that could also be brought within the court's general civil jurisdiction. Rule 9(h) provides in part:

> A pleading or count setting forth a-claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claims as an admiralty or maritime claim for the purposes of Rule 14(c), 38(e), 83 and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not.

A pleader may thus designate a claim as an "admiralty or maritime claim within the meaning of Rule 9(h)" to inform the court that the pleader has elected to proceed within the court's admiralty jurisdiction.

Although the Supreme Court has held that the Constitution does not require trial by jury in admiralty cases, it neither forbids trial by jury nor creates a right to a non-jury trial. *See Fitzgerald*

v. United States Lines Co., 374 U.S. 16, 20, 83 S.Ct. 1646, 1650, 10 L.Ed.2d 720 (1963); *Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956 ("no . . . [constitutional] requirement protects trials by the court"). This general rule survived the merger; Rule 9(h) neither creates a right to a non-jury trial, nor compromises a party's right to a jury trial. *See* Fed.R.Civ.P. 9(h) advisory committee's notes to 1966 amendment. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Fed.R.Civ.P. 38(a).

Wartsila argues that its Rule 9(h) designation attaches to all the claims in the [*1030] case[4] and urges the court to adopt the reasoning of *Insurance Co. of North America v. Virgilio*, 574 F.Supp. 48, 50-51 (S.D.Cal. 1983) (holding that plaintiff's Rule 9(h) designation in an action for declaratory relief deprived defendant of a jury trial of defendant's legal counterclaims); *see also Harrison v. Flota Mercante Grancolombiana S.A.*, 577 F.2d 968, 987 (5th Cir. 1978) (holding that plaintiff's Rule 9(h) election prohibited jury trial of legal claims in third party complaint because "we refuse to permit a third-party defendant to emasculate the election given to the plaintiff by Rule 9(h) by exercising the simple expedient of bringing in a fourth-party defendant"); *Royal Ins. Co. v. Hansen*, 125 F.R.D. 5, 8-9 (D.Mass. 1988) (defendant not entitled to jury trial of counterclaims in face of plaintiff's 9(h) designation); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Bauer Dredging Co.*, 74 F.R.D. 461, 462 (S.D.Tex. 1977) (same).

In *Virgilio*, plaintiff insurance company filed an action against its insured requesting a declaration that the insurance contract would not cover any claim the insured might bring as

[4] Because Wartsila's foreclosure action is a claim that can be brought only within the court's admiralty jurisdiction, a 9(h) designation was not necessary to apprise the district court that Wartsila had elected to proceed in admiralty. *See Emerson G.M. Diesel Inc. v. Alaskan Enter.*, 732 F.2d 1468, 1470 n. 1 (9th Cir. 1984) (ship lien foreclosure action cognizable exclusively in admiralty); Fed.R.Civ.P. 9(h).

a result of a boating accident. *Virgilio*, 574 F.Supp. at 49. Plaintiff designated its claim as a claim in admiralty pursuant to Fed.R.Civ.P. 9(h). *Id.* The defendant counterclaimed for breach of contract, breach of fiduciary duty, breach of the covenant of fair dealing and demanded a jury trial. *Id.* The court struck defendant's jury demand and distinguished *Fitzgerald*, 374 U.S. 16, 83 S.Ct. at 1646, *Blake v. Farrell Lines*, 417 F.2d 264 (3rd Cir. 1969), and *Owens-Illinois*, 698 F.2d 967, because these cases did not involve "a plaintiff electing to proceed in admiralty under 9(h)." *Virgilio*, 574 F. Supp. at 51. The court also denied defendant's request to try his claims to a jury separately from plaintiff's claims. The court reasoned that to do so "would undercut the plaintiff's election under Rule 9(h)." *Id.* We reject the reasoning of *Virgilio*.[5]

Prior to the merger of law and admiralty, the Supreme Court recognized the right to a jury trial in admiralty notwithstanding the customary non-jury component of admiralty practice. *Fitzgerald*, 374 U.S. at 21, 83 S.Ct. at 1650. In *Fitzgerald*, plaintiff filed a complaint on the admiralty side of the court containing two claims; one claim was cognizable solely in admiralty, the other claim was triable to a jury under the Jones Act, 46 U.S.C.App. § 688. *Fitzgerald*, 374 U.S. at 17,

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[5] The result in *Virgilio* has been criticized for encouraging a race to the courthouse:

> If the admiralty plaintiff wins, both claims will be tried to the bench. If the counterclaim claimant wins, his claim will be tried to a jury . . . . [T]his result flies in the fact of the Supreme Court's decision in *Beacon Theatres, Inc. v. Westover*. In that case, the Court held: "[I]f [the defendant] would have been entitled to a jury trial . . . against [the plaintiff] it cannot be deprived of that right merely because [the plaintiff] took advantage of the availability of declaratory relief to sue [the defendant] first." [*Beacon Theatres*, 359 U.S. at 504, 79 S.Ct. at 953.]
>
> Note, *The Jury on the Quarterdeck: The Effect of Pleading Admiralty Jurisdiction when a Proceeding Turns Hybrid*, 63 Tex.L.Rev. 533, 562-63 (1984) (citing G. Gilmore & C. Black, *The Law of Admiralty* § 13, at 37 (2d ed. 1975)).

83 S.Ct. at 1648. The Supreme Court held that the plaintiff had a right to have all claims tried to a jury on the admiralty side of the court. *Id.* at 21, 83 S.Ct. at 1650; *see also Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371, 371-72 (9th Cir. 1969) (right to jury trial as to Jones Act claim and to exclusive admiralty claim based on common facts); *Blake*, 417 F.2d at 266-67 (district court may require jury trial in case where legal claim is joined with exclusively maritime claim); and *Zrncevich v. Blue Haw. Enter.*, 738 F.Supp. 350, 354 (D.Haw. 1990) (Jones Act claim and non-jury admiralty claim tried to a jury in admiralty).

Since the election of the plaintiff in *Fitzgerald* to file a claim in admiralty did not deprive even the plaintiff of the right to a jury trial prior to 1966, then a plaintiff's [*1031] post-merger election to proceed in admiralty via a Rule 9(h) designation does not affect another party's right to a jury.[6] *Cf. Emerson G.M. Diesel Inc. v. Alaskan Enter.*, 732 F.2d 1468, 1471 (9th Cir.1984) (defendant in admiralty may designate third party claims in admiralty). Therefore, a defendant may also proceed within the court's general civil jurisdiction under the saving-to-suitors clause.

Regardless of whether a claim is cognizable in admiralty, the right to a jury trial on such claim is preserved despite plaintiff's election to proceed in admiralty. This court has acknowledged that the non-jury component of admiralty jurisdiction must give way to the seventh amendment. In *Owens-Illinois*, the court stated that:

> Where plaintiff alleges both admiralty and diversity as bases for federal jurisdiction, pursuant to Fed.R.Civ.P. 9(h) he has the right to elect to have his

[6] The court in *Virgilio* mistakenly refused to consider *Fitzgerald* for the reason that it did not involve a 9(h) election. A 9(h) designation does nothing more than inform the court of the claimant's election to proceed in admiralty. A 9(h) designation today is equivalent to the earlier practice of filing a claim on the admiralty side of the court prior to the merger. The merger of law and admiralty does not diminish the authority of *Fitzgerald*.

> admiralty claim adjudicated under admiralty procedures, including a bench trial, by identifying his claim as lying in admiralty. *As long as no conflict exists with a defendant's constitutional right to trial by jury, this election if properly made cannot be defeated by defendant's jury trial demand.*[7]

Owens-Illinois, 698 F.2d at 972 n. 2 (emphasis added) (citing *Harrison*, 577 F.2d at 986-87). The United States Supreme Court has held that the right to a jury trial as provided by the seventh amendment overcomes another party's preference for a bench trial when those interests conflict. *See Beacon Theatres*, 359 U.S. at 519-511, 79 S.Ct. at 956-57.

In *Beacon Theatres*, plaintiff brought suit for declaratory relief under the Sherman Antitrust Act ("Act") and defendant filed a counterclaim seeking treble damages under the Act. *Id.* at 502-03, 79 S.Ct. at 952. Defendant demanded a jury trial pursuant to Fed.R.Civ.P. 38(b). The district court directed that the equitable issues be tried before the legal issues thereby "limit[ing] the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit.'" *Id.* at 504, 79 S.Ct. at 953 (quoting *Beacon Theatres, Inc. v. Westover*, 254 F.2d 864, 874 (9th Cir.), *cert. granted*, 356 U.S. 956, 78 S.Ct. 996, 2 L.Ed.2d 1064 (1958), *rev'd*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959)).

> [T]he holding of the court below while granting . . . [plaintiff] no additional protection unless the avoidance of jury trial be considered as such, would compel . . . [defendant] to split his antitrust case, trying part to a judge and part to a jury. Such a result, which involves the postponement and subordination

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[7] Any suggestion in *Owens-Illinois* that a plaintiff has the right to a nonjury trial except when defendant has a constitutional right to a jury trial is dictum. That court did not consider the conflict between a plaintiff's Rule 9(h) designation and a defendant's right to proceed under the saving-to-suitors clause on defendant's counterclaims.

> of . . . [plaintiff's] own legal claim for declaratory relief as well as of the counterclaim which . . . [defendant] was compelled by the Federal Rules to bring, is not permissible.

Beacon Theatres, 359 U.S. at 508, 79 S.Ct. at 955 (footnote omitted).

The Court further observed that the liberal joinder rules permit "legal and equitable causes to be brought and resolved in one civil action" and preserve any statutory or constitutional right to a jury trial. *Id.* at 509, 79 S.Ct. at 956. The Court concluded that the "right to a jury trial of legal issues [cannot] be lost through prior determination of equitable claims." *Id.* at 511, 79 S.Ct. at 957; *see also Dairy Queen*, 369 U.S. at 372-73, 82 S.Ct. at 987 (both legal and equitable issues must be tried to the jury even if legal issues "incidental" to the equitable issues). The same concerns expressed by the Court in *Beacon Theatres* exist when parties join admiralty claims [*1032] with claims to which a right to a jury trial attaches. The same conclusion is therefore warranted; Rule 38(a) of the Federal Rules of Civil Procedure provides that the right to a jury, whether statutory or constitutional, "shall be preserved inviolate."

If the Union's claims are cognizable in admiralty, then the Union's right to a jury trial is preserved by the saving-to-suitors clause, 28 U.S.C. § 1333(1), and Fed.R.Civ.P. 38(a). We find that the Union has properly exercised its option under the saving-to-suitors clause: the Union's counterclaims include claims which carry the right to a jury trial and the Union has alleged independent bases of federal jurisdiction. If the Union's claims are not cognizable in admiralty, then the Union's right to demand a jury trial as provided by the constitution and Fed.R.Civ.P. 38(a) is preserved inviolate and the Union need not have alleged independent bases of jurisdiction.[8]

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[8] The court therefore finds it unnecessary to determine whether the Union Counterclaims are cognizable in admiralty. *See, e.g., Executive Jet*

Therefore, we hold that Wartsila's election to proceed in admiralty does not deprive the Union of a jury trial on the Union's properly joined claims. We note that our holding may result in the entire case being tried before a jury. This result is likely to occur if all the claims are closely related factually. *See, e.g., Fitzgerald*, 374 U.S. at 21, 83 S.Ct. at 1650 (all claims must be submitted to jury when they "arise out of one set of facts"). If the claims are not related factually, then the district court may order separate trials in order to preserve the non-jury aspect of admiralty jurisdiction. *See, e.g., Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1042 (8th Cir. 1983) (district court ordered a jury trial on defendant's counterclaim and tried admiralty claims separately; affirmed by court of appeals in absence of prejudice to defendant's right to jury trial).

IV
WARTSILA DOES NOT HAVE A RIGHT TO NONJURY TRIAL UNDER THE FOREIGN SOVEREIGN IMMUNITY ACT

The purpose and effect of the Foreign Sovereign Immunities Act ("FSIA") (codified at 28 U.S.C. §§ 1602-11) is to identify how and when a plaintiff in a civil action may assert claims against a foreign state. H.R. No. 1487, 94th Cong., 2d Sess. 6, *reprinted* in 1976 U.S.Code Cong. & Admin.News 6604, 6604. No right to a jury trial attaches to claims brought against a foreign state. *See, e.g., Rex v. Cia, Pervana de Vapores, S.A.*, 660 F.2d 61, 63 (3rd Cir. 1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 441 (1982). The term "Foreign State," as defined under the FSIA, "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).

Wartsila argues that the Union's claims are claims against a foreign state to the extent of the $14 million letter of credit posted by the FGB. Wartsila does not contend that it is immune

Aviation Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

under the FSIA, only that the Union has no right to a jury trial pursuant to it.[9] However, respondents are without standing to invoke the FSIA.

Congress intended the FSIA to supplant the earlier practice whereby a foreign sovereign would appeal to the State [*1033] Department "to make a formal suggestion of immunity to the court." H.R. No. 1487, 94th Cong., 2nd Sess. 7, *reprinted in* 1976 U.S.Code Cong. & Admin. News 6604, 6606. Congress transferred this decision to the courts. *Id.* We hold that, based on the language of the statute and its legislative history, Congress intended requests for protection under the FSIA to originate from the foreign state party.

Neither Finland nor the FGB is a party in the action. Neither entity has sought to intervene, and neither entity has requested that the FSIA be applied. Neither Wartsila nor the Connecticut bank is a foreign state and counsel for respondents have not suggested that they represent the FGB. Therefore, respondents do not have standing to invoke the FSIA. The court observes that if the FGB were to intervene at this stage of the litigation, it is unlikely such intervention would be timely under Fed.R.Civ.P. 24.

The writ shall issue.

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[9] There is no proof before the court that the FGB is an agency or instrumentality of Finland or that Connecticut Bank purchased the vessel in reliance on a $14 million letter of credit. The FSIA places the burden of proof on the entity attempting to place itself within the act:

> [W]here . . . the plaintiff alleges in his complaint that his claim is based on a foreign state's strictly commercial acts, the defendant must establish a prima facie case that it is a sovereign state and that the plaintiff's claim arises out of a public act.

Meadows v. Dominican Republic, 817 F.2d 517, 522 (9th Cir.), *cert. denied*, 484 U.S. 976, 108 S.Ct. 486, 98 L.Ed.2d 485 (1987). While Wartsila does not claim immunity, and although the Union has not alleged that its claims are "based on a foreign state's strictly commercial acts," the burden is upon the foreign state to establish its status as a foreign sovereign and thus its right to the benefits of the FSIA.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-70433
DC #-89-0338-SPK

WILMINGTON TRUST COMPANY,

Petitioner,

and

INTERNATIONAL ORGANIZATION
OF MASTERS, MATES & PILOTS

Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Respondent,

and

CONNECTICUT BANK &
TRUST COMPANY, *et al.*,

Real Parties
in Interest.

BEFORE: TANG and NOONAN, Circuit Judges,
and SHUBB,* District Judge.

ORDER

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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* Honorable William B. Shubb, United States District Judge for the Eastern District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed November 4, 1991]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

IN ADMIRALTY

CIV. NO. 89-00338 SPK

THE CONNECTICUT BANK AND TRUST COMPANY, NATIONAL ASSOCIATION, not in its individual capacity but solely as indenture trustee,

Plaintiff,

and

WILMINGTON TRUST COMPANY, Trustee on behalf of THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS; VSE CORPORATION; THEODAVIES MARINE AGENCIES, INC.; PACIFICO CREATIVE SERVICE INC.; THE MARITIME INSTITUTE OF TECHNOLOGY AND GRADUATE STUDIES; INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS and JOHN F. SOKOLOWSKI; HAWAII STEVEDORES, INC.; H.T.&T. CO., INC., MCCABE HAMILTON & RENNY CO., INC.; MATSON SERVICES, INC.; AMERICAN SHIP MANAGEMENT, INC., JAS W. GLOVER, LTD.; and THE LIHUE PLANTATION COMPANY, LIMITED dba KAUAI SUGAR STORAGE COMPANY,

Intervening Plaintiffs,

v.

The U.S.-Flag Vessel "Monterey", O.N. 264687, her engines, boilers, tackle, etc., *IN REM*, and S.S. MONTEREY PARTNERSHIP, *IN PERSONAM*,

Defendants,

S.S. MONTEREY LIMITED PARTNERSHIP,
and WILMINGTON TRUST COMPANY,
Trustee on behalf of THE INTERNATIONAL
ORGANIZATION OF MASTERS,
MATES & PILOTS,

Counterclaimants,

v.

THE CONNECTICUT BANK AND TRUST
COMPANY, NATIONAL ASSOCIATION,
not in its individual capacity but solely as indenture
trustee, and WARTSILA MARINE INDUSTRIES
INC. and OY WARTSILA AB,

Counterclaim
Defendants.

ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE JURY DEMAND

Claimant and Plaintiff in Intervention WILMINGTON TRUST COMPANY and Counterclaim Defendant INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS' Motion to Set Action for Jury Trial and Plaintiff/Counterclaim Defendant THE CONNECTICUT BANK AND TRUST COMPANY'S Motion to Strike Jury Demand came on for hearing on July 30, 1990 before the Honorable Samuel P. King. Nenad Krek, Esq., appeared on behalf of the Wilmington Trust Company and the International Organization of Masters, Mates & Pilots (collectively "MM&P"). Michael Jaffy [sic], Esq., Dean H. Robb, Esq., and Steven M. Egesdal, Esq., appeared on behalf of Plaintiff THE CONNECTICUT BANK AND TRUST COMPANY, N.A. ("Connecticut Bank").

The court has given due consideration to the arguments of counsel presented at the hearing and to the papers filed herein regarding the pending motions. For the reasons set forth in the memoranda of the Plaintiff Connecticut Bank, the Connecticut

Bank's Motion to Strike Jury Demand is hereby GRANTED, and the MM&P's Motion to Set Action for Jury Trial is hereby DENIED.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, July 30, 1990

[Entered July 31, 1990]

/s/ Samuel P. King
United States District Judge

UNITED STATES CODE TITLE 28
Judiciary And Judicial Procedure

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

APPENDIX D

Federal Rules of Civil Procedure (1991)
Rule 9. Pleading Special Matters

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

Federal Rules of Civil Procedure (1991)
Rule 38. Jury Trial of Right

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

* * * * *

(e) **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).